STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION

In the Matter of the Appeal by

[redacted]
Research Analyst I/Social Work Associate
From Demotion in Lieu of Layoff
7255 San Gabriel Road
Atascadero, CA 93422

SPB Case No. D0619

Represented by:
Jan Howell Marx
Attorney at Law
864 Osos Street, Ste. B
San Luis Obispo, CA 93401

Respondent:
Department of Mental Health
Personnel Officer
1600 9th Street
Sacramento, CA 95814

Represented by:
Linda S. Persons
Personnel Officer
Department of Mental Health
Atascadero State Hospital
P.O. Box 7001
Atascadero, CA 93423

DECISION

The attached Proposed Decision of the Hearing Officer is hereby adopted as the Department of Personnel Administration's (DPA) Decision in the above matter. DPA is compelled by Article 16, section 16.1(g) of the Unit 1 (California State Employees Association) Collective Bargaining Agreement to accept the proposed decision of the Hearing Officer in layoff appeals.

IT IS SO ORDERED: August 10, 1998.

K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

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PROPOSED DECISION

This matter came on regularly for hearing before Mary C. Bowman, Hearing Officer, Department of Personnel Administration (DPA) at 9:00 a.m. on July 16, 1998, and 9:00 a.m. on July 22, 1998, at San Luis Obispo, California. The Hearing Officer appeared telephonically on July 22, 1998. Appellant, [redacted] was present and was represented by Jan Howell Marx, her attorney. Respondent, Department of Mental Health (DMH), was represented by Linda S. Persons, Personnel Officer, Atascadero State Hospital (ASH).

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision.

I

JURISDICTION

The above demotion in lieu of layoff, effective close of business August 31, 1995, and appellant's appeal therefrom comply with the procedural requirements of Government Code sections 19997 et seq. and Article 16, section 16.1 of the Unit 1 California State Employees Association (CSEA) Collective Bargaining Agreement (hereafter the bargaining agreement).

The record remained open until close of business July 30, 1998, for the representatives to submit written argument.

II

EMPLOYMENT HISTORY

From February 1980 through March 1991, appellant was employed intermittently by DMH at ASH as a Graduate Student Assistant. On April 1, 1991, she was appointed to a permanent position as a Social Work Assistant; and on March 1, 1992, she was promoted to Research Analyst I (Social/Behavioral). At the time of her demotion in lieu of layoff she was a Research Analyst I, Range C, assigned to the Sex Offender Treatment and Evaluation Project (SOTEP) at ASH. She was demoted in lieu of layoff to her former classification of Social Work Assistant.

The Research Analyst I classification requires an employee to work under supervision to perform technical research and statistical work in one or more of a wide variety of research fields. Entry into the series typically comes from college recruitment sources or through related State classifications at a lower level. The basic educational requirement is the equivalent to graduation from college with any major but with extensive course work in an appropriate area.[1]

The Social Work Associate classification requires an employee to work under direct supervision in a State Mental Health or Retardation Program; provide assistance in all phases of the social work program; collect data and prepare applications and reports necessary to obtain benefits and community resources for patients or clients; and assist in performing casework duties and group activities. Its basic educational requirement is the equivalent to graduation from college, preferably with major work in social science and humanities.[2]

III

HISTORY OF THE CASE

SOTEP was a clinical-research project which included a study intended to measure the effectiveness of treatment upon child molesters and rapists. In 1981 legislation was adopted which mandated its creation as an alternative to a program providing for the commitment of

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[1] See SPB Specification for Research Analyst 1.

[2] See SPB Specification for Social Work Assistant.

mentally disordered sex offenders to State hospitals. In 1995 the study or treatment phase of the program commenced at ASH. The legislation was scheduled to expire on June 30, 1995.

On or about September 30, 1994, California Governor Pete Wilson signed Senate Bill No. 728, which extended SOTEP's sunset date to January 1998. However, due to his opposition to the study, Wilson directed the Department of Finance to eliminate its funding and redirect the moneys to "real preventive initiatives such as early mental health counseling for children."[3]

As a result of the Governor's action, in November 1998 the Personnel Office at ASH began to develop a plan for closure of the SOTEP study which would require absorption or layoff of all positions in SOTEP. The positions included the following classifications: Psychiatrist, Psychiatric Social Worker, Unit Supervisor, Clinical Psychologist, Rehabilitation Therapist, Office Technician, Research Program Specialist, Social Work Associates, Psychiatric Technicians, Registered Nurse and Senior Psychiatric Technicians. The number of persons in those classification was approximately 36-40.

On November 28, 1994, [redacted], Staff Services Analyst, Position Control at ASH prepared a memorandum to the Executive Officer on the subject of the closure plan for SOTEP. In her memorandum she advised that it appeared that all staff, with the exception of one Social Work Associate and one Research Analyst, could be absorbed into current vacancies although some staffing ratios would be over-allocated. In the report [redacted] noted that the potential layoff could affect other employees in the hospital, such as four Social Work Assistants assigned to another program.

On February 24, 1998, the Personnel Officer at ASH sent a memorandum to respondent's Personnel Administration Branch (its Headquarters' Personnel Office) entitled "Declaration of Surplus Employees." In that memorandum she advised that since SOTEP was projected to close on June 30, 1995, ASH had determined that one Research Analyst position was surplus and had "estimated seniority and employment history of the two employees currently in the classification and projected potential demotional patterns." The Personnel Officer requested that DMH officially list the Research Analyst class as surplus and obtain official

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[3] See Governor's Memorandum to the California State Senate re Senate Bill No. 728, dated September 30, 1994.

seniority scores for persons in that class. She also requested the layoff be limited to the geographic location to avoid a statewide impact. DMH approved the requests.

Thereafter, the Personnel Officer at ASH calculated demotional paths for the affected employees in the Research Analyst I class. She determined that appellant had a demotional path to her former classification of Social Work Assistant. The other Research Analyst ([redacted]) did not have a personal demotion path but was eligible based on her higher seniority score to relocate to the one vacant Research Analyst I position at ASH.

On March 23, 1995, respondent's Manager for Classification and Pay notified the Classification and Compensation Division at DPA of the proposed layoff plan. The memorandum to DPA stated in its entirety:

> "As a result of the closing of the treatment portion of the Sex Offender Treatment and Evaluation Program (SOTEP) at Atascadero State Hospital (ASH) on June 30, 1995, the Department of Mental Health is anticipating a surplus of one in the class of Research Analyst I (Social/Behavioral). Although other classifications are involved, we are confident that all other staff will be placed without recourse to the layoff process.
>
> We are beginning a gradual phase-out of staff immediately. We have to complete some follow-up work but hope to have all phases, including potential layoffs, completed by August 1995. As the SOTEP treatment unit is an easily identifiable program specific to ASH and as a statewide layoff would be expensive as well as cumbersome, we are requesting a geographically based layoff.
>
> We are eager to avoid any layoffs or demotions so are planning to offer SROA and surplus status to both of the Research Analyst I incumbents at ASH.
>
> I have attached a completed 'Request for Preliminary Seniority Scores' form (DPA-009) and a proposed demotional chart. Please let me know if you need additional information."

On May 2, 1995, respondent's Chief of Labor Relations provided 60 days' notice to the California State Employees Association (CSEA) of the layoff plan, as required, and offered to meet and confer on the matter upon CSEA's request.

On June 14, 1995, [redacted] Staff Services Analyst for ASH's Employment Office – Personnel, advised respondent's Personnel Administration Branch that ASH offered appellant and Wise the opportunity to participate in the State Restriction of Appointment (SROA) process and appellant accepted. A copy of appellant's completed SROA form was

forwarded to the Branch. The SROA action was taken to comply with Government Code section 19998.1

Also on June 14, 1995, [redacted] sent DMH's headquarters a completed AB 3001 questionnaire regarding the Research Analysts. The questionnaire was submitted to comply with the requirements of Government Code section 19798 regarding the composition of the affected work force.

On July 31, 1995, the Personnel Officer for ASH mailed appellant an official Notice of Layoff advising her that because of discontinuance of funding for SOTEP, ASH was required to reduce its personnel and that effective August 31, 1995, she would be laid off/demoted in lieu of layoff from her classification. The notice also advised her that her seniority score was 93 points which was not high enough for her to remain in her current classification. Appellant was given the option of demotion in lieu of layoff to her former class of Social Work Associate. Appellant was also advised that she was eligible to have her name remain on the reemployment list for five years or until she was reappointed to her current classification.

On August 9, 1995, the Personnel Officer forwarded to DPA appellant's written request to establish her reemployment list eligibility (form DPA-010), pursuant to Government Code sections 19997.11 and 19997.12. Also, on August 9, 1998, she mailed DPA copies of the official seniority list for Research Analyst I (Social/Behavioral), the Notice of Layoff served on appellant and appellant's completed response to the notice, as required.

Thereafter, appellant was demoted in lieu of layoff to the class of Social Work Assistant and reassigned to a vacant position in that classification at ASH. (She currently holds a position in that classification.)

IV

CAUSE FOR APPEAL

Appellant challenged the layoff on the grounds that it was procedurally defective and that it was not made in good faith and was otherwise improper. Specifically appellant alleged the following procedural defects:

(1) CSEA and ASH never met and conferred regarding alternatives;

(2) Appellant had a higher score than others who were not laid off;

(3) The demotion in lieu of layoff process was flawed; and

(4) Appellant did not receive fair treatment as a surplus employee.

Appellant alleged the following acts of bad faith and improper purpose:

(1) Appellant's supervisor retaliated against her because she was a whistle blower and discriminated against her on the basis of gender;

(2) The ostensible reasons for lay off/demotion in lieu of layoff were mere pretext;

(3) ASH's Personnel Office and her supervisor violated their duty to assist her in finding another job and her supervisor blocked her ability to obtain another job; and

(4) ASH manipulated and misused the SROA list.

V

ISSUE 1: WAS THE LAYOFF PROCEDURALLY DEFECTIVE?

Appellant made several allegations relating to procedural defects. Her allegations are examined below.

Allegation 1: CSEA and ASH Never Met and Conferred Regarding Alternatives.

The bargaining agreement provides that whenever the State determines it necessary to lay off employees, the State and union shall meet in good faith to explore alternatives to laying off employees such as, but not limited to, voluntary reduced work time, retraining, early retirement and unpaid leaves of absence.

Appellant alleged that respondent failed to comply with this provision because she was never personally offered any alternative but layoff.

The evidence established that on May 2, 1995, the Chief of Labor Relations at the Department of Mental Health mailed CSEA a letter advising the union that the layoff was projected for June 30, 1995, and inviting CSEA to contact DMH if the union wished to meet and confer. There was no evidence offered as to whether CSEA met with respondent or played any role in the layoff.

The Personnel Officer at ASH assigned [redacted] of Position Control to analyze and develop a geographical layoff plan. [redacted] testified she reviewed the staffing for SOTEP and ASH and determined the steps to be taken to reduce the impact on the facility. She testified she received no input from appellant's supervisor and independently performed her analysis. The evidence established she used standard procedures for identifying positions available, for

reviewing classifications, for determining demotional paths, and for seeking transfers and demotions.

Appellant's alternatives once the plan was effectuated were to accept a demotion in lieu of layoff, to be laid off, to be placed on an SROA list, to be placed on a reemployment list and/or to permissively transfer or promote to another position at ASH or another appointing authority. Appellant was also provided with information as to other available positions with DMH and given time and opportunity to interview and test so that she might be able to find a vacant position.

Allegation 2: Appellant Had a Higher Seniority Score Than Others Not Laid Off.

Government Code section 19997.39 (a) provides that "Layoff shall be made in accordance with the relative seniority of the employees in the class of layoff." The bargaining agreement provides that employees "shall be laid off in the order of seniority pursuant to Government Code sections 19997.2 through 19997.7."

Appellant alleged that she was told she would be laid off prior to [redacted] and [redacted] who had less seniority that she did.

The evidence established that the only other employee in the same class of layoff as appellant was [redacted] It was undisputed that [redacted] had a seniority score of 174, which was much higher than appellant's score of 93. Neither [redacted] nor [redacted] was in the same class.

Allegation 3: The Demotion in Lieu of Layoff Process Was Flawed.

Government Code sections 19997.2 through 19997.7 and the bargaining agreement set forth procedures for properly effectuating a layoff. Those procedures generally include laying off employees in the appropriate order of seniority, providing timely and adequate notice to employees and the union(s); offering affected employee transfers or demotions in lieu of layoff to available (vacant) positions in the same class; establishing reemployment lists and certifying eligible employees from it; and calculating seniority scores of impacted employees in each class by months of State service.

Appellant alleged that the layoff process was flawed because she was the only surplus employee designated by Personnel and her supervisor to be laid off or demoted in lieu of layoff.

The evidence established that appellant's supervisor did not play any role in "designating" employees in SOTEP for layoff and that the Personnel Office followed the above procedures for relocating (by transfer and demotion) approximately 36 SOTEP employees. A number of employees transferred to vacant positions at ASH. In one case two half-time positions were consolidated to created a vacant position. During her development of a layoff plan, [redacted] determined that there were two employees in the classification of Research Analyst and only one position available for transfer. She also determined all other employees could be transferred to vacant positions. She determined that appellant had a demotional pattern which would save her from actual layoff. A position in the demotional classification of Social Work Associate was available; and it was offered to appellant.

Appellant was obviously dissatisfied with the efforts of the Personnel Office, but the evidence showed the Personnel Office discharged its statutory duty in a reasonable fashion given the time frame available. The best indication of the adequacy of its efforts was that out of approximately 36 employees none were laid off and only one suffered a demotion.

There was no evidence of irregularities in the layoff plan or process at ASH.

Allegation 4: Appellant Did Not Receive Fair Treatment as a Surplus Employee.

Government Code section 19998.1 provides for the temporary restriction of appointments (SROA) within a department to allow employees subject to layoff an opportunity to transfer to other positions within their classification; and Government Code sections 19997.11 and 19997.12 require the State to establish a reemployment list by class for all employees who are laid off. Those lists take precedence over all other types of employment lists for the classes in which the employees were laid off.

Appellant claimed that by accepting placement on an SROA or a reemployment list she was prohibited from transferring to other positions for which she qualified. She also claimed that she was denied the right to transfer and passed over for [redacted], the other Research Analyst.

The evidence established appellant was given the opportunity to be on an approved geographic SROA list and she accepted. She also was placed on a reemployment list. There was no evidence that either opportunity prevented her from applying for other positions with ASH, DMH or another appointing authority.

At the time of her demotion in lieu of layoff, there were no vacant positions available in the class of Research Analyst at ASH except for the one to which [redacted] was transferred. [redacted] was statutorily entitled to the position because she had a greater seniority score than appellant. Appellant felt that placement was unfair because she had more "experience" and "expertise" in the class. However, the statute and the bargaining agreement (by reference) compelled DMH to rely upon seniority, not experience or expertise, to calculate the scores.

There was no evidence appellant was not fairly treated as a surplus employee.

VI

ISSUE 2: WAS THE LAYOFF NOT MADE IN GOOD FAITH AND OTHERWISE IMPROPER?

Appellant made several allegations that ASH's Personnel Office and her supervisor did not act in good faith and acted in an improper manner. Her allegations are examined below.

Allegation 1: Appellant's Supervisor Retaliated Against Her Because She Was a Whistle Blower and Discriminated Against Her on the Basis of Gender.

State law prohibits an employer from retaliating against an employee for reporting alleged improper governmental activity to the State Auditor. (See Government Code section 8547 et seq.) State and federal law also prohibit gender discrimination including disparate treatment.

Appellant alleged that her immediate supervisor retaliated against her because she had complained to him about faulty data used in the SOTEP study and that he engaged in gender discrimination. The acts of retaliation and/or discrimination complained of included manipulating her demotion, telling others about her layoff before he told her, denying her a merit salary adjustment and assigning humiliating tasks such as posting data weekly on his wall.

The evidence established that appellant ascribed to her supervisor much more authority than he possessed. Appellant's supervisor neither initiated nor controlled the layoff process or procedures. Employees in the Personnel Office were responsible for identifying classifications, position vacancies and alternatives to layoff, which they did consistent with existing laws and rules.

The evidence established appellant complained at times during staff meetings and informally to both her supervisor and the supervisor at headquarters about her frustration with

incomplete data provided by staff in the study. Her supervisor advised her to direct her complaints to staff. She never raised the issue to a higher level than her supervisor and his counterpart in headquarters. It certainly was never reported outside DMH.

The evidence established that long before any particular position was scheduled for layoff all the employees in SOTEP were aware of the potential for closure in June 1998, when the statutory sunset day was to occur. Further, months in advance meetings were held and information provided to the employees about the status of the potential layoff. The evidence also established that all the SOTEP employees spoke with one another about the layoff situation. There was no evidence appellant's supervisor made a point to single her out regarding layoff.

The evidence established that the supervisor approved appellant for a range change from Range B to Range C. He did not deny appellant a merit salary adjustment. The delay in granting the range change was the result of an error by the Personnel Office which failed to discover her eligibility until some months after the fact. The problem was corrected and a back pay check was issued to appellant.

With respect to the data posting, appellant's supervisor reasonably explained that he required weekly posting of data on his wall so that he could get a visual image of what was still missing. This was particularly important near the end of the study when the data had to be transmitted to Sacramento. He still employs this practice in his current studies. It was unreasonable for appellant to assume this procedure was some type of retaliation or punishment because she was the primary data collector. It was a duty consistent with her job responsibilities.

Appellant's supervisor acknowledged the data would be ripped off the wall weekly and replaced with the new data. (The old charts were unnecessary since the data was stored.)

Allegation 2: The Ostensible Reasons for the Layoff Were Mere Pretext.

As cited above the only acceptable basis for a layoff in State service is "lack of work or funds" or "when it is advisable in the interest of the economy."

Appellant claimed that the reasons for the layoff were pretextual and that her supervisor and the Personnel Office "carefully targeted" her and "plotted the sequence of events."

The evidence was overwhelming that the funding cut which led to the demise of SOTEP came directly from the Governor's Office. It also demonstrated that DMH worked hand-in-hand with SPB and DPA to comply with the required procedures for effectuating a layoff plan. There

was no evidence establishing some nefarious plot by ASH Personnel Office or anyone in decision-making authority to effectuate the layoff plan.

Allegation 3: ASH's Personnel Office and her Supervisor Violated their Duty to Assist Her in Finding Another Job and Blocked Her Ability to Obtain Another Job.

Government Code sections 19998 and 19998.1 state it is the policy of the State when an employee is to be separated from State Service that steps should be taken on an interdepartmental basis to assist the employee in locating, preparing to qualify for and being placed in other positions in State civil service.

Appellant claimed that her Personnel Office and her supervisor failed to assist her and actively blocked her from finding other placement by providing a "false evaluation" of her performance and by keeping her from other available positions at ASH.

The evidence was to the contrary. The Personnel Office established a layoff plan which saved appellant from being laid off and permitted her to demote to her former classification. She was also given the opportunity to be placed on SROA and a reemployment list. The Personnel Office provided her updated information regarding job vacancies; and her supervisor gave her work time to prepare for and interview for vacant positions.

The evidence established that appellant's supervisor had previously prepared a written performance evaluation in which he pointed out what he perceived as deficiencies in her work performance—that her data entry skills were relatively slow and that she needed to be repeatedly reminded to complete a database tracking her data entry or research data. The appellant protested the performance evaluation and her supervisor agreed to (and did) remove it from her official personnel file before the layoff. Appellant's supervisor's agreement to remove the personnel evaluation was based on his recognition that he failed to properly document her poor performance. It was not an admission that the report was false. Since the report was not in her official personnel file, it could not have hampered or blocked her ability to obtain other employment. Appellant's supervisor issued her a Letter of Commendation for her assistance on SOTEP which was placed in and remained in her official personnel file. He also gave her time at

work to search for, apply for and interview for other positions. Appellant's supervisor had no statutory duty to do more.

Appellant made numerous efforts to seek out other positions to avoid demotion. She sought a position in the Multiple Outcome Measurement (MOMS) Research Program as a Research Program Specialist. A displaced psychologist, Dr. West, filled that position. She applied for a position with the Adult Basic Education Program (ABE/BPSR). Her application was denied because the position required a licensed Psychiatric Technician, Senior Psychiatric Technician or Registered Nurse. Appellant was not licensed. She applied for a Staff Services Analyst position as Wellness Coordinator. That position was eliminated at ASH and, therefore, the position was not filled. Appellant spoke with staff in the Forensic Services Unit about the creation of a position there for Research Analyst. The unit did not have any Research Analyst positions and was not scheduled for any. Appellant suggested at hearing that other Research Analyst positions were funded at headquarters and her supervisor could have assigned her there. However, her supervisor had no such authority. No specific position vacancy was identified.

There was absolutely no evidence that anyone in Personnel or appellant's supervisor passed along negative information about appellant to any potential employers or that she was prohibited from transferring to any vacant position.

Allegation 4: ASH Manipulated and Misused the SROA List.

Appellant's bargaining agreement at section 16.1 provides that employees shall be laid off in order of seniority, "pursuant to Government Code sections 19997.2 through 19997.7 and applicable SPB and DPA rules." DPA rules provide at 599.854 – 599.854.4 that employees who are scheduled for layoffs may participate in an SROA program and be placed on an SROA for the classes of layoff when DPA determines their participation in the SROA Program will help prevent the layoff of other employees. Eligibility for SROA is usually 120 calendar days.

Appellant claimed that she was adversely affected by being placed on a geographically-restricted SROA. She also claimed that she was not able to seek out or transfer to other positions because she was on SROA and that she should have been placed on SROA for other classifications.

The evidence established appellant voluntarily accepted placement on the SROA and never asked to be removed. Appellant failed to present evidence that placement on an SROA

hinders an employee from obtaining employment. In fact, it would have aided her had a position in her classification and geographical area become available.

Appellant's demand that she be placed on a statewide SROA or SROA for other classes would require the State to act outside the law. The union negotiated a bargaining agreement with the State by which it agreed that the Government Code provisions regarding SROA would apply to employees in its bargaining unit. One of those provisions is that DPA may restrict the SROA to a geographical area designated by the employer. In this case DPA approved a geographical SROA at the recommendation of DMH. The reason was that a single facility, ASH, was affected by the closure of the SOTEP study at its original sunset date. Also, the law requires that persons be placed on SROA for their own class, not those of other employees.

There was no evidence of manipulation or misuse of the SROA.

VII

OTHER ISSUES

Appellant raised a number of other procedural issues in early stages of the proceeding. She either presented no evidence on those issues or counsel did not argue the issues in her brief. Those issues are deemed to have been waived by appellant and are not discussed in this decision.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Codes section 19997 and the bargaining agreement provide that "whenever it is necessary because of lack of work or funds, or whenever it is advisable in the interest of economy" to reduce staff or employees in a State agency, the agency may lay off employees pursuant to applicable laws and rules. Government Code section 19997.14 and the bargaining agreement provide that an employee may appeal to DPA after receiving a notice of layoff on the ground that the required procedure has not been complied with or that the layoff has not been made in good faith or was otherwise improper.

In the instant case, the evidence demonstrated conclusively that appellant was demoted in lieu of layoff because of the Governor's elimination of funding for the program to which she was assigned at ASH and because ASH did not have a vacant Research Analyst I position to which she could be relocated.

Appellant did not prove that respondent failed to comply with the required layoff procedure. Appellant also did not prove that her demotion in lieu of layoff was not made in good faith or was otherwise improper. Under such circumstances the appeal from demotion in lieu of layoff must be denied.

* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [redacted] from demotion in lieu of layoff effective August 31, 1995, is hereby denied.

* * * * *

The above constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the Department of Personnel Administration as its decision in the case.

DATED: July 11, 1998

Mary C. Bowman

MARY C. BOWMAN
Hearing Officer
Department of Personnel Administration